

Via Fax # (202) 616-9937

To: Ms. Renatta Hesse, Antitrust Division, U.S. Department of Justice
From: Dr. Yaron Brook, executive director, the Ayn Rand Institute;
Dr. Onkar Ghate, resident fellow, the Ayn Rand Institute
Date: January 21, 2002
Re: Microsoft Antitrust Case

The Federal Justice Department should drop the antitrust case against Microsoft. If at this stage in the proceedings it is impossible to drop the case, the Justice Department should settle the case on as favorable terms to Microsoft as legally permissible. (If possible, the Justice Department should create a legal settlement more favorable to Microsoft than the one Microsoft agreed to in November of 2001.)

To understand why one needs to understand two points, one general and one particular. First, antitrust laws are non-objective and unjust. Second, Microsoft is guilty of no actual crime. Let us begin with the first point.

The "actions" that anti-trust laws prohibit are vague, contradictory, undefined. For instance, antitrust laws prohibit companies from engaging in "restraint of trade." But what specific actions constitute "restraint of trade"? If, as is done repeatedly in the business world, a company signs an exclusive distribution agreement with another company, is that "restraint of trade" because now other potential competitors are excluded from that area of the market? Or if a company sells a computer to individual X, is that "restraint of trade" because competing computer companies can no longer sell X a computer since he has need for only one? No—the courts have declared to businessmen—only those "restraints" that are "unreasonable" are illegal. But which specific "restraints" are "unreasonable"? No definition is to be found in the law, so no company can know before it acts which actions are in law legal and which are not.

Consider another example. The antitrust laws prohibit "unfair" trade practices. But again, what counts as an "unfair" practice? Is it any business practice that, for instance, causes bankruptcies among some of a firm's competitors, because they cannot find a way to compete with the firm's low prices and/or superior products? Or is it any practice that the administration in power disapproves of? Again, no answer is to be found in the law, so it is impossible for a company to determine beforehand which specific actions the law prohibits.

Take one last example. Under antitrust laws, a company can be charged with "predatory pricing" if it sets prices below those of its competitors, because the competitors might as a result go bankrupt. It can be charged with "monopoly pricing" if it sets prices that are deemed too high, because then it is supposedly bilking consumers of their hard-earned income. But if it therefore decides to set prices at the level of those of its competitors it can be charged with "collusion" or "conspiracy" because now it is said to be no longer "competing."

In the nightmarish world of antitrust law, any and no action can be pronounced illegal. There are and can be no definite, objective principles specified in the law—and as a result a businessman has no way to determine, before he acts, whether his action is legal or not. In practice, this means that businessmen are at the mercy of the government. Any moment the government wants to cripple a particular company, it can unleash the antitrust laws against the

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The Ayn Rand Institute • The Center for The Advancement of Objectivism
4640 Admiralty Way, Suite 406 • Marina del Rey, CA 90292-6617 • U.S.A.

voice: 310-306-9232 • fax: 310-306-4925 • e-mail: mail@aynrand.org • web: www.aynrand.org

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company. In logic, a business has no possible defense against a charge of "restraint of trade" or "unfair" trade policies or "predatory pricing" because the charge itself has no objective meaning. The antitrust laws, therefore, vest the government with arbitrary power.

The result, unsurprisingly, is that when, say, a bureaucrat is disgruntled with a successful company because it has failed to share (i.e., give away) its wealth or support the government's particular programs—or when a government thinks that destroying a powerful company will win it votes with misguided citizens who believe that Big Business is their enemy—or when resentful, envious competitors (like Netscape and Oracle and AOL in the Microsoft case) can persuade their government representatives to cripple a superior competitor—the brunt of the antitrust laws descend upon that company.

It is no accident that it is America's most successful, most productive, most admired companies—Microsoft, IBM, Intel, Wal-Mart, American Airlines, Standard Oil, etc.—that are subjected to antitrust lawsuits.

As a form of granting arbitrary power to the government, antitrust laws are unconstitutional and un-American. As a means of penalizing the successful for being successful, antitrust laws are a perversion of justice.

Let us therefore now leave to one side antitrust law, under which any action of a company could be considered a crime, and ask whether in actual fact Microsoft is guilty of any crime.

What are the principal accusations against Microsoft?

Microsoft is accused of "unfair" competition. But competition refers to the process by which companies utilize their assets and personnel to build better and/or cheaper products. They thereby seek to earn, through voluntary trade, even greater profits. In a free market, there is no such thing as "unfair" competition. There are only better and worse competitors. In other words, some companies are better than others at research and development, at structuring long-term, mutually-beneficial business agreements, at marketing products, at keeping good employees happy yet challenged. Microsoft, for example, excels at all these processes—and many more. (The charge that Microsoft is not innovative is particularly disingenuous given its continual upgrades and improvements to its major products; even Judge Jackson had to concede this point.) The fact that Microsoft is one of the greatest competitors the business world has seen is, in a free nation, not a crime but a virtue.

The only "unfair competition" that exists is in fact not competition. If, say, the mafia threatens to blow up a shopkeeper's store unless he gives it a percentage of his sales, the mafia is not engaged in competition, albeit unfair. They are engaged in coercion—precisely to prevent voluntary trade and the free market from operating. When Netscape loses sales to Microsoft because Microsoft's browser is better and/or cheaper, Netscape's loss of sales bears no similarity to a shopkeeper's "loss" of sales to the mafia. One must never equate the voluntary with the coerced.

Secondly, Microsoft is accused of "predatory pricing." Translated into reality, this means that Microsoft is able to charge prices below those of its competitors, such as Netscape. Some of these competitors, who cannot match Microsoft's low prices, lose market share or go bankrupt. But it is Microsoft's incredible efficiency and productiveness that allows it to undersell its competition yet still make large profits. Again, this represents not criminal behavior but real virtue.

Finally, Microsoft is accused of wielding "monopoly power." This accusation as well is based on equating the voluntary with the coerced.

It is true that Microsoft has a dominant market position in some segments of the software industry and that some of its competitors have gone out of business. But this is because Microsoft has out-competed them: it is more innovative, more efficient, a better marketer, and/or a better employer than other software firms. Microsoft, in other words, has earned its dominant position.

And it continues to earn it: it faces constant competition, even if there are no actual competitors presently in its market. For whenever another entrepreneur can figure out a way to produce similar software at a cheaper price or better software at an attractive price (or some undreamt of product that makes current software obsolete), he is free to enter Microsoft's market. And if he has a sound business plan, he will be able to raise the necessary capital even if he has none: there are thousands of venture capitalists looking for the next Bill Gates. Microsoft's dominant position in the software industry, in other words, must be earned anew each day.

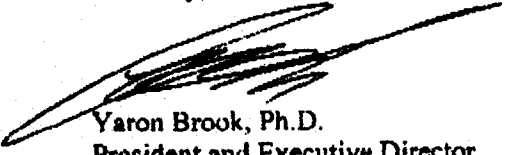
So once again, Microsoft is being attacked for its success: in reality it has no monopoly power just brilliant management.

The only monopolies that can in fact exist are government-created ones. Only a government can prevent someone from entering a market and thus eliminate competition. The Post Office, for instance, is a monopoly. There is little doubt that Federal Express could provide better service, more cheaply, and still earn a profit. But the government forcibly prevents it from entering the Post Office's market. The Post Office's dominant market position is unearned: it offers sub-par service but because of government coercion faces no competition. Microsoft's dominant position, by contrast, is earned: it faces constant competition, which it continues to win. Again, do not equate the voluntary with the coerced.

Microsoft is the epitome of American business success: it produces enormous wealth through intelligence and hard work. Imagine the wealth that would exist—for every firm, for every employee, for every shareholder, for every customer—if all companies in America were run by a Bill Gates. The fact that they are not should not lead us to destroy Bill Gate's creation but, all the more, to admire and champion it.

Why should the Justice Department drop its case against Microsoft (or settle it with as small a penalty as possible)? Because antitrust laws are arbitrary laws that penalize virtue for being virtue—as the specific accusations against Microsoft clearly reveal.

Sincerely,



Yaron Brook, Ph.D.
President and Executive Director
The Ayn Rand Institute



Onkar Ghate, Ph.D.
Resident Fellow
The Ayn Rand Institute